

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
)

Petition for Declaratory Ruling Whether)
Voice over Internet Protocol Services)
Are Entitled to the Interconnection Rights of)
Telecommunications Carriers)

WC Docket No. 08-56

**REPLY COMMENTS OF
VERMONT TELEPHONE COMPANY**

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SUMMARY

There is broad consensus among the commenters that only “telecommunications carriers” are entitled to interconnection under Sections 251 and 252 of the Act, and that, unless and until VoIP providers are found to be telecommunications carriers, they are not entitled to such interconnection rights. Two State commissions urge the FCC to end the uncertainty in this regard, and VTel concurs with those commissions that the time is ripe for the FCC to issue clarification on these matters.

Guidance is also still required as to Comcast’s regulatory status and entitlement to interconnection under Sections 251 and 252. Regardless of which Comcast affiliate is at issue, the record remains devoid of any evidence that any Comcast entity in fact meets the definition of a telecommunications carrier. That definition relies on the same test as that for “common carrier” status: does the entity hold itself out to serve the public indifferently? There is nothing to indicate that any Comcast affiliate holds itself out in such a manner; as the Enforcement Bureau has so recently noted, there is no reason to believe that any of the Comcast “telecommunications” entities has ever provided or offered service to a single party other than the Comcast VoIP affiliate. Nothing in Comcast’s comments suggests that the Bureau’s observation was incorrect, or that Comcast Vermont serves (or plans to serve) any unaffiliated third parties.

VTel will gladly provide interconnection to Comcast Vermont if it is in fact a telecommunications carrier entitled to such interconnection. In light of the facts available to VTel, however, it seeks Commission guidance as to whether Comcast Vermont is indeed a telecommunications carrier.

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Vermont Telephone Company ("VTel"), by its attorneys and pursuant to the Commission's Public Notice¹ in the above-captioned proceeding, hereby submits its reply to comments filed regarding VTel's Petition for Declaratory Ruling (the "Petition"). The Petition had requested that the Commission resolve the following questions: (1) Whether or not only "telecommunications carriers" are entitled to interconnection with LEC facilities by the express terms of Sections 251 and 252 of the Act; (2) Whether or not VoIP providers are entitled to interconnection pursuant to those sections of the Act when they assert they are not "telecommunications carriers;" and (3) Whether or not Comcast is a telecommunications carrier and, therefore, is entitled to interconnection pursuant to those statutory provisions.

We respectfully suggest the record supports the following:

¹ *Pleading Cycle Established for Comments on Vermont Telephone Company's Petition for Declaratory Ruling Regarding Interconnection Rights, Public Notice*, WC Docket No. 08-56, DA 08-916 (rel. April 18, 2008).

I. The FCC Should Issue Guidance to LECs about Whether VoIP Providers, and Other Entities Who are not Telecommunications Carriers under the Act, are Entitled to Interconnection under Sections 251 and 252 of the Act.

The weight of public comments suggest broad consensus that only “telecommunications carriers” are entitled to interconnection under Sections 251 and 252 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §§ 251, 252, and that VoIP services are not so entitled unless and until the Commission determines that VoIP providers are “telecommunications carriers”. *See, e.g.*, Comments of Verizon at 2 (filed May 19, 2008); Comments of AT&T Inc. at 2-3 (filed May 19, 2008) (“AT&T Comments”); Comments of Embarq at 2 (filed May 19, 2008); Comments of FeatureGroupIP at 4-5 (filed May 19, 2008); Comments of Independent Telephone and Telecommunications Alliance at 2-3 (filed May 19, 2008). *Cf.* Comments of Bright House Networks at 3-4 (filed May 19, 2008). Even Comcast Corporation (“Comcast”) agrees with the proposition that only “telecommunications carriers” may obtain interconnection under Sections 251 and 252. *See* Comments of Comcast Corporation at 4 (filed May 19, 2008) (“Comcast Comments”). While several commenters find no controversy to be resolved in regard to VTel’s first two questions, two state regulators, the California Public Utilities Commission and the Washington Utilities and Transportation Commission, urge the Commission to resolve the issue of VoIP entitlement to interconnection rights.

VTel respectfully submits to the FCC that the time may be now ripe to remove uncertainty from this highly important aspect of the regulatory environment for VoIP, and indeed for any carriers who decline to embrace the Act’s requirements for

“telecommunications carriers,” to issue a declaratory ruling in accordance with the weight of the comments.

**II. The Commission Should Determine the Regulatory Status
of Comcast Phone of Vermont.**

The only question remaining, then, is whether the entity requesting interconnection at this time from VTel, Comcast Phone of Vermont, LLC (“Comcast Vermont”), is a telecommunications carrier. VTel points out that it has willingly, rapidly, and successfully provided such interconnection to other entities who are “telecommunications carriers.” VTel remains willing and able to provide this service to Comcast. VTel’s question is simply what are its obligations, as it seeks to fulfill the letter and spirit of FCC as well as state requirements in this regard.

AT&T argues that the question should be resolved by evidentiary hearing before the Vermont Public Service Board (“Vermont PSB”). *See* AT&T Comments at 2. VTel recognizes that Vermont’s Public Service Board is a dignified, qualified, and highly respected agency currently wrestling with some aspects of this issue. However our concern is what appears to be Comcast’s regulatory “arbitrage,” using well-intentioned, complex, and sometimes inconsistent federal and state rules and requirements in various states across America to effectively bypass the letter and spirit of such regulations in most states, and perhaps ultimately in all states. Consequently we see no reason for the FCC, as well as Vermont’s well-respected Public Service Board, to not conduct and conclude their own inquiries. VTel would be a willing participant in both. Indeed, we seek guidance from both entities, and we are committed to fulfilling the letter and spirit of regulations that may be set by both entities. The FCC has ample authority to interpret what constitutes a “telecommunications carrier” entitled to interconnection under the Act.

See e.g., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (discussing the Commission's authority to interpret and carry out the provisions of the Act, including Sections 251 and 252).

The Vermont Department of Public Service, who VTel also knows and deeply respects, appears to presume that, because Comcast Vermont has been issued a Certificate of Public Good, it should be treated as offering common carrier, "telecommunications" services in the State of Vermont, even if it is not actually doing so. *See* Comments of Vermont Department of Public Service at 6 (filed May 19, 2008). Yet it appears to VTel that, to date at least, Comcast Vermont is not held to the same requirements or oversight that are presumed appropriate, or necessary, for other "telecommunications carriers." The issue appears, again and again, to come down to regulatory arbitrage, and Comcast's pattern of using a wholly-owned wholesale entity as its regulated "telecommunications carrier" arm, resulting in an outcome where the Comcast company that serves the public, that would usually be accountable for service quality, and for meeting local and state and federal regulations, is operating "beneath the radar," without regulation.

VTel has said before, and respectfully states again, that it does not fault Comcast for regulatory arbitrage, or for setting up a small wholly-owned subsidiary to attract regulation, and a much larger wholly-owned subsidiary to bypass regulation. We admire Comcast's tradition of entrepreneurial behavior. Our concern is simply that we are unsure what requirements we must fulfill, under the Act, in responding to this arbitrage.

Comcast, naturally, asserts that Comcast Vermont is a telecommunications carrier. Before addressing this further, VTel would like to reply to Comcast's claims

that VTel has misstated or mischaracterized facts regarding the entity seeking interconnection. *See* Comcast Comments at 10. To the best of our knowledge, VTel did not misstate or mischaracterize any facts regarding Comcast's corporate structure. If VTel has made any misstatements, VTel will be pleased to correct the record, when it is demonstrated that any clarification is needed. To VTel's knowledge, the broad outline of its thesis remains unchallenged.

VTel's Petition acknowledged that Comcast Vermont was authorized as a competitive local exchange carrier ("CLEC") by the Vermont PSB. VTel noted that it had not located evidence that Comcast Vermont (or Comcast generally) was offering any form of local common carrier service in Vermont. VTel respectfully submits that such evidence is still absent from the record. Comcast states that the entity requesting interconnection "furnishes wholesale telecommunications services ... to Comcast IP Phone II, LLC ('Comcast Digital Voice')." Comcast Comments at 2. Comcast Vermont seeks interconnection "so that Comcast's retail VoIP affiliate can compete effectively to serve VTel's customers[,]" *id.* at 5; however, Comcast gives no indication that Comcast Vermont has any intention of providing wholesale services to any other entity. Although Comcast claims that Comcast Vermont offers wholesale services to any interested party, nothing in the text or exhibits of the Comcast Comments indicates that Comcast Vermont has ever provided telecommunications services to a single entity other than its own VoIP affiliate. Indeed, Comcast's arguments and exhibits fail to provide a single example of any one of its "wholesale telecommunications" entities serving an unaffiliated customer anywhere in the United States. The present case is thus readily distinguishable from

Time Warner.² In that case, there was no question that the entities seeking interconnection, MCI and Sprint, were long-established telecommunications carriers with a proven history of providing services to the public, rather than merely to their own affiliates. Comcast has no such “track record,” and its status as a “telecommunications carrier” – whether wholesale or retail – is still open to question.

The Act defines a “telecommunications carrier” as “any provider of telecommunications services” and provides that a telecommunications carrier is to be treated as a common carrier “to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. §153(44). “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public[.]” 47 U.S.C. §153(46). “Telecommunications” is “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. §153(43). The Commission has held that these definitions, added by the Telecommunications Act of 1996, are equivalent to the common law definition of a “common carrier.” *See Federal-State Board on Universal Service, Declaratory Ruling*, 14 FCC Rcd. 3040, ¶ 6 (1999).

Under the common law, an “essential element” of common carriage was “holding oneself out to serve the public indiscriminately[.]” *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”). Although this analysis acknowledged that a common carrier’s services might not be of interest to

² *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd. 3153 (WCB 2007).

all portions of the public, *id.*; the Commission nonetheless has traditionally expected that a common carrier would serve at least *some* unaffiliated customers. *See e.g.*

Teleprompter Corp., 43 RR 2d 1575, n. 9 (1978); *Black Hills Video Corp.*, 5 RR 2d 612 (1965).

The Commission's Enforcement Bureau (the "Bureau") has recently confirmed the validity of a traditional analysis of common carrier status. *See Bright House Networks, LLC, et al., v. Verizon California, Inc., et al., Recommended Decision*, DA 08-860 (Enf. Bur., rel. April 11, 2008). The Bureau there found that Bright House and Comcast had failed to demonstrate that their "competitive carrier" affiliates were, in fact, telecommunications carriers, because they had not shown that they were "publicly hold[ing] themselves out as offering those telecommunications indiscriminately to any and all potential customers." *Id.* at ¶ 17. In particular, the Bureau noted the dearth of evidence "that the Competitive Carriers affiliated with Bright House and Comcast have ever provided the telecommunications at issue to any entity other than Bright House and Comcast, respectively." *Id.* While reaffirming that common carrier services can include "specialized" services of interest to only a "fraction" of the public, the Bureau nonetheless held that "the fact that the Competitive Carriers have, to date, provided telecommunications only to their own affiliates has significant probative value concerning whether the Competitive Carriers have held themselves out publicly to all potential customers." *Id.* at n. 46.

We respectfully suggest that the same considerations appear to apply in the present case. To the best of our knowledge there is simply no evidence to indicate that Comcast Vermont or any other Comcast "wholesale" affiliate has ever sought to provide

service to a wide or even a narrow set of parties other than Comcast's VoIP affiliate, or undertaken any form of marketing or other effort to let third parties know that wholesale telecommunications services were available from these entities. Nor does the record reveal any intent by Comcast Vermont to seek third party customers or serve any entity but its VoIP affiliate. In the absence of evidence that Comcast Vermont, or any Comcast "wholesale" affiliate, is in fact conducting itself as a common carrier, VTel asks the FCC to advise whether this extremely narrowly-structured "telecommunications carrier" should be permitted, on behalf of its sole client, the interconnection rights of a common carrier.

Additionally, the Bureau has previously found that the mere issuance of state authorizations and approval of interconnection agreements are not necessarily dispositive of common carrier status, seeing no evidence that those documents constituted an actual "public offering." *Id.* at ¶ 18. Consequently, notwithstanding that Vermont's PSB is a highly-regarded public agency, the Vermont PSB's issuance of a Certificate of Public Good to Comcast Vermont, and the Vermont PSB's approval of an interconnection agreement between Comcast Vermont and Verizon New England, Inc., does not end the inquiry before the Commission. *See* Comcast Comments, Exhibits 1 and 2. It does not appear from the materials regarding either proceeding that the Vermont PSB conducted the sort of thorough investigation of Comcast Vermont's actual or proposed business activities that might have occurred had Comcast Vermont's recitation -- that it provides telecommunications services -- been challenged in any manner. The Commission should therefore look at what Comcast Vermont "*actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it*" in determining

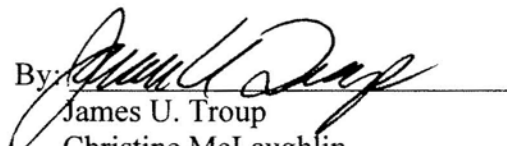
whether Comcast Vermont is truly a telecommunications carrier. See Bright House, DA 08-860 at n. 53, quoting Thibodeaux v. Executive Jet Int'l, Inc., 328 F.3d 742, 750 (5th Cir. 2003) (emphasis added).

III. Conclusion.

WHEREFORE, the foregoing premises considered, VTel respectfully requests that the Commission clarify, in accordance with the comments: (1) that only “telecommunications carriers” are entitled to interconnection with LEC facilities by the express terms of Sections 251 and 252 of the Act; and (2) that VoIP providers are not entitled to interconnection pursuant to those sections of the Act. VTel further respectfully requests that the Commission determine, in light of long-standing precedent and the more recent *Bright House* decision, whether or not Comcast Vermont is a telecommunications carrier and, therefore, is entitled to interconnection pursuant to those statutory provisions, and furthermore to clarify what additional steps an entity such as Comcast must and should take to qualify for such interconnection. VTel reiterates, again, that it is willing and able to provide such interconnection, and has done so for competitive carriers in the past; VTel simply seeks guidance regarding how to best fulfill the letter and spirit of FCC and state regulatory requirements.

Respectfully submitted,

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June 9, 2008

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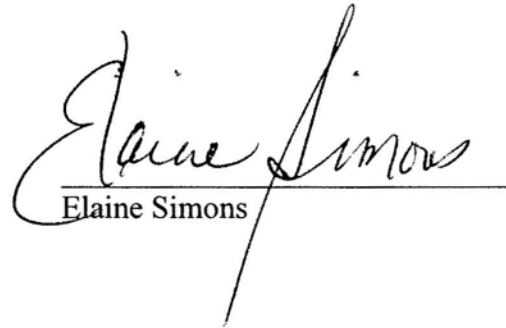
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